in 1948 and Karrimor International Ltd ('the applicants') in 1972. The applicants first carried on business as manufacturers of school bags and knapsacks bearing the trade mark 'Karrimor' in 1958 and they have since then in the course of their business manufactured and sold such school bags and knapsacks and their trade mark 'Karrimor' has been registered in Great Britain and many foreign countries.

The applicants have been distributing and selling such school bags and knapsacks in Singapore, through agents, since 1977 and such goods have been widely advertised in newspapers in Singapore. The sales of such goods in Singapore have been substantial.

The applicants have since 1958 acquired a worldwide reputation in their products. They have acquired a substantial and established reputation and goodwill in the business of 'Karrimor' school bags and knapsacks. The trade and the public exclusively identify 'Karrimor' school bags and knapsacks with the applicants.

The respondent has been distributing and selling school bags and knapsacks with the trade mark 'Karrinor' since only 1984. The school bags and knapsacks which the respondent are selling are very similar in appearance to the products of the applicants. The phonetic similarity of the words 'Karrimor' and 'Karrinor' and the similarity in appearance of the goods would lead to deception or confusion in the minds of the public.

There is no evidence that the respondent had advertised his products widely in newspapers. The respondent must have been well aware of the well-known trade mark of the applicants. He has not explained at all his choice of the trade mark 'Karrinor' which is very similar to 'Karrimor'. The name of the applicants contains the trade mark 'Karrimor'. This fact clearly indicates that the respondent did not independently devise his trade mark but in fact copied it from the applicants' trade mark. The respondent in truth is not the true proprietor of the mark 'Karrinor'. There is no doubt that the respondent is trying to obtain the benefit of the worldwide reputation of the applicants.

Section 15(1) of the Act provides:

> It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would, by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design.

The court always has a discretion under s 39 whether to rectify the Register or not in the light of all the circumstances of the case. The demerits of the applicants are irrelevant to the question whether rectification should be ordered, or not, at least where a likelihood of confusion is established. The question is not between the applicants on the one hand and the respondent on the other, but between the public and the respondent (see *Kerley's Law of Trade Marks & Trade Names* (11th Ed) p 175 para 11-29).

I was of the view that, in all the circumstances of the case, the court should exercise its discretion to expunge the respondent's registered trade mark from the Register. For these reasons I granted the application of the applicants.

Application granted.

Solicitors: *Bernard Rada & Lee; Lim Ganesh & Liu.*

Reported by *Terence Tan Bian Chye*

Che Som bte Yip & Ors v Maha Pte Ltd & Ors (Maha Pte Ltd & Anor, Third Parties)

HIGH COURT (SINGAPORE) - SUIT NO 2788 OF 1978
CHAO HICK TIN JC
30 JUNE 1989

Contract - Undue influence - Capacity - Requirements for setting aside contract where one party of unsound mind - Whether one party knew of other party's unsound mind - Constructive knowledge - Whether borrower was agent of lender in procuring security from surety

Land Law - Mortgage - Mortgage deed executed by person of unsound mind - Whether binding

Evidence - Expert evidence - Conflict between psychiatrists as to unsoundness of mind of party

Agency - Creation of - Lender asking borrower to procure security from surety - Imputation of knowledge of agent to principal

The first and second plaintiffs are the committee of the estate of the third plaintiff, having been appointed by orders of court under the Mental Disorders and Treatment Act (Cap 178, 1985 Ed). The present action was taken by the first and second plaintiffs for and on behalf of the third plaintiff for a declaration that a deed of mortgage ('the deed') of a certain property ('the property'), allegedly executed by the third plaintiff in favour of the third defendant, be declared null and void and of no legal effect. It was alleged that the third plaintiff was, at the time of the execution of the mortgage deed, of unsound mind and incapable of managing himself and his affairs. They also sought a declaration that all consequential entries made at the Registry of Titles and Deeds be declared null and void. The deed was executed between the first defendant of the first part, the second defendant and the third plaintiff of the second part and the third defendant of the third part. The third defendant is a foreign bank carrying on business in Singapore. The mortgage was executed as part security for banking facilities granted by the third defendant to the first defendant. The second defendant and the third plaintiff are the tenants in common in equal shares of the property.

A consultant psychiatrist appeared as witness for the plaintiffs and testified that anyone having a conversation with the third plaintiff for five to ten minutes would have great doubts

about his mental condition. The consultant who appeared for the defence agreed that the third plaintiff was subnormal but placed a great deal of emphasis on the social development of the third plaintiff, ie the adaptation of an individual to life. He claimed that, if the gist of the mortgage document were explained to the third plaintiff in simple language, the latter would be able to understand.

Held, granting the declaration sought by the plaintiffs:

(1) The third plaintiff had testified before the court, and having heard the way he gave evidence, the court had no hesitation in accepting the opinion of the plaintiffs' psychiatrist witness that the third plaintiff had no capacity to understand the deed. The fact that he managed to keep himself out of trouble and is homely does not necessarily mean that he cannot be of unsound mind.

(2) The test to be applied is whether there was understanding on the part of the third plaintiff of the transaction. The very concept of a mortgage, as security for banking facilities to be granted by the bank to the company in which his two brothers had an interest, is not a simple matter of which the third plaintiff was able to understand. It was very telling that he did not even know that he was a co-owner of the property.

(3) The general rule is that a deed executed by a person who has no mental capacity to do so is voidable. The question here is whether it was voidable against the bank who was said to be an innocent party.

(4) Case law had established that a plea of unsound mind to avoid a contract was only permissible if it could be shown that the other party to the contract knew of the insanity. The issue that arose was whether the bank knew, or ought to have known, that the third plaintiff was mentally disordered and had no contractual capacity.

(5) From the evidence, the court found that there was no actual knowledge on the part of any officers of the bank regarding the third plaintiff's mental incapacity. The point to consider is whether knowledge may be imputed to the bank in view of the circumstances. Here, the way in which the bank went about to obtain the mortgages of the property as security shows that it made the second plaintiff its agent to secure the mortgage. It was through the second plaintiff that the title deeds of the property were forwarded to the bank. At no time did the bank deal directly with the two owners of the property. By dealing with the owners of the property through the second plaintiff rather than directly, the bank had made the second plaintiff its agent and the bank must be imputed to have the knowledge which the second plaintiff had of the mental incapacity of the third plaintiff.

(6) Even if this view was wrong, constructive knowledge of the bank could still be inferred from the circumstances surrounding the execution of the deed by the third plaintiff, including the way in which the bank dealt with the owners of the property. It would be different if the solicitor, who had witnessed the execution of the deed by the third plaintiff, had clearly explained the full purport of the deed, but this was not done.

(7) This omission on the part of the solicitor was critical when one considers that the third plaintiff did not sign the deed but placed his thumb-print on it. It must have been obvious to the solicitor that he was dealing with an illiterate person. He should have at least explained to the third plaintiff the nature and effect of the deed and made sure he understood it before asking him to put his thumb-print to it.

(8) It is clear that whether in a particular case the lender has made the debtor his agent to obtain security from a surety, and whether the debtor has exercised undue influence over the surety of a kind which would entitle the surety to set aside the security, would very much depend on the facts.

(9) In the present case, the relationship of the second plaintiff and the third plaintiff as brothers does not per se give rise to a presumption of undue influence, but on the evidence, there can be no doubt that the second plaintiff did in fact exercise undue influence over the third plaintiff in securing the execution, by the third plaintiff, of the deed.

(10) The influence of the second plaintiff over the third plaintiff persisted through the execution of the deed. The solicitor was physically present there but this was of no significance. The transaction was totally to the disadvantage of the third plaintiff, yet neither the bank nor its solicitors saw it fit to advise the third plaintiff to take independent legal advice. The bank must be held to be affected by the undue influence exercised by the second plaintiff over the third plaintiff. The deed should be set aside on this ground.

(11) The court would therefore grant a declaration that the deed executed by the third plaintiff was voidable at the option of his committee, and the deed would be set aside in so far as it affected the third plaintiff, with such other consequential reliefs as were necessary.

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No 69 of 1989.]

Cases referred to

1 *Birkin* v *Wing* (1890) 63 LT 80 (folld)
2 *Hart* v *O'Connor* [1985] AC 1000 (folld)
3 *Campbell* v *Hooper* (1855) 65 ER 603 (refd)
4 *Imperial Loan Co* v *Stone* [1892] 1 QB 599 (folld)
5 *National Westminster Bank* v *Morgan* [1985] AC 686 (refd)
6 *Turnbull & Co* v *Duval* [1902] AC 429 (refd)
7 *Chaplin & Co* v *Brammall* [1908] 1 KB 233 (folld)
8 *Avon Finance Co Ltd* v *Bridger* [1985] 2 All ER 281 (refd)
9 *Kingsnorth Trust Ltd* v *Bell* [1986] 1 All ER 423 (refd)
10 *Coldunell Ltd* v *Gallon* [1986] 1 All ER 429 (refd)
11 *Bank of Baroda* v *Shah & Anor* [1988] 3 All ER 24 (refd)
12 *Niell* v *Morley* (1804) 32 ER 687 (distd)
13 *Molton* v *Camroux* (1849) 154 ER 1107 (distd)

V Ramakrishnan for the plaintiffs.
Ng Kian Fong for the second defendant.
Bala Chandran s/o Kandiah (*Tan Teng Muan* with him) for the third defendant.

Cur Adv Vult

Chao Hick Tin JC: The first and second plaintiffs are the committee of the estate of the third plaintiff, having been appointed by orders of court under the Mental Disorders and Treatment Act (Cap 178, 1985 Ed). The present action is taken by the first and second plaintiffs, for and on behalf of the third plaintiff, for a declaration that a deed of mortgage ('the mortgage deed') of the property at 344 Onan Road ('the said property') dated 17 December 1974, allegedly executed by the third plaintiff in favour of the third defendant, be declared null and void and of no legal effect. They also asked for a declaration that all conse-

quential entries made at the Registry of Titles and Deeds be declared null and void.

The mortgage deed was executed between Maha Pte Ltd ('the first defendant') of the first part, Abdul Hamid bin Bilal ('the second defendant') and Alias bin Bilal ('third plaintiff') of the second part and Habib Bank Ltd ('the third defendant') of the third part. The third defendant was and is a bank incorporated in Pakistan and was at the relevant time having a branch and carrying on banking business in Singapore ('the bank'). The said mortgage was executed as part security for banking facilities granted by the third defendant to the first defendant. The second defendant and the third plaintiff are the tenants in common in equal shares of the said property.

The main ground upon which this action is brought is that the third plaintiff was, at the time of the execution of the mortgage deed, of unsound mind and incapable of managing himself and his affairs. Reliance was placed on the fact that, pursuant to Originating Summons No 237 of 1978, an inquiry was held on 31 July 1978 into the mental condition of the third plaintiff and an order was made on that day that the third plaintiff was of unsound mind and incapable of managing himself and his affairs. However, in view of the fact that that order was obtained on an uncontested basis, I do not think it is necessarily conclusive for the present action. The plaintiffs have not so asserted and a fairly substantial part of the time of this trial was spent in hearing evidence on the mental condition of the third plaintiff. Before going into that aspect of the evidence, it may be useful for me to set out some pertinent background facts.

Background

The third plaintiff was born in the year 1935. He is three to four years younger than the second plaintiff. Their mother passed away when the third plaintiff was four years old and he was taken care of by his maternal aunties and his two elder sisters. He started to walk and to talk late. He was sent to attend a primary school when he was eight. However, he only attended school for up to about a year. He could not take care of himself at school, particularly his toilet needs. He was asked to leave school. The second plaintiff tried to teach the third plaintiff at home. According to the second plaintiff, the third plaintiff was not able to execute simple assignments. According to an elder sister, Zulaika bte Bilal (PW4), the third plaintiff would help in the house when asked to. But he could not do things properly. She said, 'Even for the usual things to be done, he would not understand. I had to repeat many times. Whenever he talks, sometimes it makes sense, sometimes not.' Even now, PW4 has to supervise the third plaintiff when he takes a bath.

Maha Pte Ltd ('the company'), the first defendant, was incorporated in Singapore on 12 September 1973. The company is now no longer in existence having been struck off the Register of Companies in December 1987. It was a trading company which dealt, among others, in rubber. The second plaintiff and the second defendant (the two elder brothers of the third plaintiff) were directors of the company. The shareholders of the company were Ismail bin Bilal (the second plaintiff) holding 200,003 shares, Abdul Hamid bin Bilal (the second defendant) holding 50,002 shares and the first plaintiff (the wife of the second plaintiff) holding 50,000 share. A fourth person, one Kam Cheong Lin, held 1 share. Though in name the majority shares were held by the second plaintiff, I accept his evidence that the company essentially belonged to one Peter Wahid Andu, who was a top official with the Sabah Civil Service. It was not convenient to have it on record that he owned those shares. Thus, the shares which were in the second plaintiff's name were in fact held in trust for Peter Wahid Andu.

Sometime on or about 16 November 1973, the company applied to the third defendant for banking facilities - $400,000 for overdraft and trust receipts and $600,000 for letters of credit. The application was made by the directors of the company, ie the first plaintiffs, the second plaintiff and the second defendant, who together also signed a letter of guarantee to the bank for a total sum of $1,000,000. The second plaintiff and the bank must have discussed the need for more tangible security, because on 16 January 1974, the second plaintiff, writing in his capacity as the managing director of the company (which began with the words 'We spoke'), forwarded to the bank the title deeds of the said property to enable the bank to complete the formalities to have the said property equitably mortgaged to the bank. The second plaintiff wrote:

> This property is owned by the Bilal family in the name of my two brothers, namely, A Hamid bin Bilal and Alias bin Bilal. I would appreciate if you could prepare the necessary forms for completion by the above two gentlemen.

Following that, the bank wrote to its solicitors, Osborne Jones & Co, requesting the latter to prepare the documentation for creating an equitable mortgage to the bank. I should mention here that the company also offered No 339 Onan Road as security to the bank. For reasons relating to the title of that property which do not concern us here, house No 339 Onan Road was not accepted as security. The solicitors subsequently advised the bank not to proceed on the basis of an equitable mortgage but that a first legal mortgage over the said property should be created for a sum not exceeding $60,000. The bank accepted this advice and asked the solicitors to draw up the necessary documents creating a legal mortgage for up to $60,000 for a period of five years. On 18 July 1974, the solicitors forwarded to the bank a draft mortgage for its approval. At this point, I ought to mention that all the correspondence between the bank and its solicitors were not copied to the company or the owners of the said property.

In the meantime, on 7 March 1974, Peter Wahid Andu attended at the bank and placed a sum of $250,000 on fixed deposit which was also to be a security for the banking facilities granted by the bank to the company. In addition, Peter Wahid Andu also signed a letter of guarantee in favour of the bank, for an amount of up to $500,000, for the facilities granted by the bank to the company.

On 23 July 1974, the bank forwarded a copy of the draft mortgage deed to the company for approval. By this letter, the company would have been aware for the first time that the deed that was being prepared was for a legal mortgage of the said property. The second plaintiff replied to the bank by endorsing on the duplicate of the letter itself that the draft mortgage deed was acceptable. Due to reasons which were not clear, the bank did not revert to its solicitors until sometime in October 1974 when the solicitor in charge of this matter in Osborne Jones & Co, Mr Francis Pillai, made some inquiries. On 2 November 1974, the solicitors wrote to the second defendant, Abdul Hamid bin Bilal and this was the first letter written by the bank's solicitors to the owners of the said property. It was in these terms:

> We refer to the above matter and are pleased to inform you that the indenture of mortgage is now ready for execution.
>
> Please therefore call at our office together with Mr Alias bin Bilal and two directors of Maha Pte Ltd to execute the same and also bring along the common seal of Maha Pte Ltd.
>
> Kindly let us have your cheque for $1,090.75 which is made up as follows:
>
> | | | |
> |---|---|---|
> | 1 | Our costs as solicitors for the bank | $575.00 |
> | 2 | Our costs as solicitors for the borrowers | $143.75 |
> | | ... | |

A reminder was sent by the solicitors on 27 November 1974 to the second defendant asking him to comply with the letter of 2 November 1974.

When Mr Francis Pillai wrote the letter of 2 November 1974, he did not receive any express intimation that the borrowers and/or owners/mortgagors would wish him to act for them in the matter. It would appear that he assumed that the company would want him to act for them. Thus, he included in the total costs payable the item 'costs as solicitors for the borrowers'. The following questions and answers in cross-examination are very pertinent:

Q: Would you agree that in the absence of warrant to act you had no authority to act for them?
A: That is correct.
Q: You never acted for the third plaintiff and the second defendant?
A: I did not act for them. I never acted for the third plaintiff and second defendant.
Q: If you have not acted for them, why send a bill to them: see AB37?
A: AB37 shows the property was owned by the third plaintiff and second defendant. I did a search at Registry of Companies and found the second defendant was a director of Maha. Thus I thought it right to write to the second defendant; he is the common factor.
Q: So you acted for both second defendant and third plaintiff?
A: I acted for the second defendant as a director of Maha. Third plaintiff was just a surety.
Q: Who was the borrower?
A: Maha.
Q: Company had no security?
A: Yes.
Q: Property jointly belonged to second defendant and third plaintiff?
A: Yes.
Q: They are mortgaging the property to the bank to enable bank to give facilities to Maha?
A: Yes.
Q: Somebody must act for the mortgagors?
A: The second defendant was also a director of the company. It did not dawn on me that I had to act for third plaintiff. They are all in the family.
Q: Shouldn't you advise them to seek independent advice?
A: I was acting for second defendant as director of Maha.
Q: If you were not acting for the second defendant and third plaintiff as owners of the property, wouldn't it be proper for you to advise them to seek independent advice?
A: It did not arise in my mind at that time.

From the foregoing, I find that Mr Francis Pillai, notwithstanding that he received the sum of $143.75 as solicitors' costs for the borrowers, did not in fact consider himself as acting for the mortgagors. That perhaps explains why, as we shall see later, he made no effort to explain to the owners/mortgagors the nature and contents of the deed placed before the latter for execution.

On 12 December 1974, the second plaintiff, the third plaintiff and the second defendant attended at the office of Osborne Jones & Co. As between the evidence of the second plaintiff and the second defendant on the one hand, and the evidence of Mr Francis Pillai on the other, there is only one very important discrepancy. Whereas the former claimed that no solicitor was present when they executed the mortgage deed, the latter said that he was present to witness the execution of the deed by the mortgagors as well as the directors of the company. I accept the evidence of Mr Francis Pillai that he was present and witnessed the execution. This is also borne out by the two attestation clauses of Mr Francis Pillai attached to the mortgage deed.

There is, however, one material aspect of Mr Francis Pillai's evidence which I must allude to. His evidence is that other than making sure from his staff as to the identity of the three persons there who were about to sign the deed, he did not explain to any of them the nature of the contents of that document. He did not speak to them at all. He assumed that all of them understood what they were about to sign as the bank extended to him a copy of the letter of 23 July 1974 (AB21), whereon the second plain-

tiff had made an endorsement indicating his approval of the draft mortgage deed.

Mental condition of the third plaintiff

I will now turn to deal with the evidence on the mental condition of the third plaintiff. Dr Paul Ngui, consultant psychiatrist, gave evidence for the plaintiffs and Dr Wong Yip Chong, consultant psychiatrist, testified for the third defendant.

Dr Ngui first saw the third plaintiff on 31 May 1978 and in his report of the same day (PB14-15), he stated the following:

> On psychiatric examination, he was spontaneous and relevant. He was able to give his name, age and address correctly. However, he had some difficulty in giving ... the number of siblings in his family. He was able to write his name in block letters but spells out his address incorrectly. On testing his arithmetic ability, it was extremely poor, he was unable to add simple sums such as 6 + 7, 7 + 7 ...
>
> During the conversation, his ideas expressed were very superficial and he had difficulty in comprehending more complex questions. On questioning, he had no idea at all whether he owns any property and believes that the property at 344 Onan Road is owned by one of his brothers.
>
> I am of the opinion that he is suffering from mental subnormality and he is not fit to manage his own affairs.

This report was put in connection with the application in OS 237 of 1978.

In a further report dated 14 August 1978, Dr Paul Ngui expressed the following opinion on the question whether the third plaintiff was able to understand the mortgage deed to which he had affixed his thumb-print:

> As stated in my previous report, Mr Bilal's primary condition is one of mental subnormality. This condition has been present from his early childhood with delayed developmental milestones. Because of this condition, he is only able to understand simple words and ideas; he is unable to understand more complex aspects.
>
> I have also perused the indenture of mortgage ... it is my opinion that the contract was beyond his understanding. He also had no knowledge at that time that he was a co-owner of the property at 344 Onan Road.
>
> It is my opinion that he had no contractual ability when he put his thumb-print on the contract of 17 December 1974.

In his evidence before me, Dr Ngui basically reaffirmed what he stated in his reports and he reiterated that he did not think that the third plaintiff would be able to understand the nature of the mortgage deed. Shortly before the commencement of this trial before me, Dr Ngui examined the third plaintiff again and found that his condition had been the same. He said that a person having a normal conversation with the third plaintiff for five to ten minutes would have great doubts about his mental condition. In cross-examination by counsel for the third defendant, Dr Ngui agreed that the third plaintiff looked ostensibly sane but was in fact of unsound mind.

The third plaintiff was examined by Dr Wong Yip Chong sometime in November 1987. Dr Wong examined him for an hour and a half, though he did not put him through any practical test. Generally, Dr Wong agreed with the clinical findings of Dr Ngui that the third plaintiff was subnormal and was a mental defective. Dr Wong, however, placed a great deal of emphasis on the social development of the third plaintiff, ie the adaptation of an individual to life. He highlighted the fact that the third plaintiff could carry out spontaneous and relevant conversation. He also managed to keep himself out of trouble. He could do simple chores for the family and listen to the radio and watch television. As regards his contractual capacity, Dr Wong has this to say in his report dated 30 November 1987:

> With reference to his contractual competency, while I agree that with his mental limitations he could be mentally incompetent in contracting anything of a complex nature, this may not be so for a simple contract.
>
> Therefore, if in the purchase of his property, it was presented to him simply as to whether or not he wanted to buy that property, he would have the required mental ability to comprehend and decide.
>
> This is especially so when his social development appears to have reached the level where he can reasonably clearly distinguish what he owns from what he doesn't as well as realize that what he owns may need money to buy.
>
> Likewise, if the mortgage matter were presented to him simply as doing something to the house to borrow money from the bank, then he again would be able to comprehend the rudimentary contracting essence underlying the transactions.
>
> In conclusion, at the time of execution of the documents, he was likely to have had sufficient mental capacity to understand the basic meaning at the bottom of the contract(s) he committed himself to with the party(s) concerned when he placed his thumb-print on the relevant documents. This is especially so if the fundamentals had been repeated to him over a period of time.

Dr Wong in his evidence before me seems to say that if the gist of the mortgage deed were explained to the third plaintiff in simple language, the latter would be able to understand. He agreed that the mortgage deed is a complex document. In cross-examination, Dr Wong also said the third plaintiff cannot handle money. Dr Wong himself did not attempt to explain the mortgage deed to the third plaintiff to determine whether or not the latter understood it as the mortgage deed was not furnished by the bank to Dr Wong. In re-examination, Dr Wong said that the third plaintiff would be able to understand better if the explanation was done by someone he trusted.

The third plaintiff has testified before me and having heard the way he gave evidence, (very often answers were forthcoming only after much effort on the part of the

interpreter and in some instances the answers do not make sense), I have no hesitation in accepting the opinion of Dr Ngui that the third plaintiff had no capacity to understand the mortgage deed which he executed. The test to be applied is whether there was understanding on the part of the third plaintiff of the transaction: see *Birkin* v *Wing*.[1] In my opinion, the very concept of a mortgage as a security for banking facilities to be granted by the bank to the company in which his other two brothers had an interest, is not a simple matter on which the third plaintiff was able to understand. It is very telling that the third plaintiff did not even know that he is a co-owner of the said property. He even thought that the said property belongs to the second plaintiff as the second plaintiff lives there. I do not think that that can be explained away merely by saying that he has a bad memory. The simple truth is that he did not understand and still does not understand what it means to own a property. All he seems to know is that he is living at 339 Onan Road. Certain simple things around the house he could help, but beyond that I have grave reservations. He was not able even to recount the number of siblings he has or to give their names. When asked if he were given seven cigarettes and four were taken away from him, how many would be left, he replied six. Accordingly, I find that the third plaintiff had no capacity to enter into the mortgage deed on the day in question. He did not know what he was executing. The fact that a person manages to keep himself out of trouble and is homely does not necessarily mean that he cannot be of unsound mind.

The general rule is that a deed executed by a person who has no mental capacity to do so is voidable. But the question I have to consider is whether it is voidable against the bank, whom counsel said was an innocent party.

As regards the general effect of mental incapacity on the contractual competence of a person, 30 *Halsbury's Laws of England* (4th Ed) paras 1005-1006 state the following:

> There must be a free and full consent to bind a person in contract. Consent is an act of reason and of volition or choice, and it is on the ground that there is a want of rational and deliberate consent that the contracts of mentally disordered persons may be invalidated. A valid contract cannot be made by a person suffering from such incapacity of mind as not to understand the nature of what he is doing ...
>
> A fair contract with a person who was apparently of sound mind, but who in fact was suffering at the time of the contract from such mental disorder as rendered him incapable of entering into the contract, is voidable but not void. If the contract is not to be enforced against him, the person mentally disordered must prove that the other party either knew that he was of unsound mind or knew of such facts as would justify the court in inferring such knowledge.

The word 'fair' in the above quotation may have to be deleted in view of the decision of the Privy Council in *Hart* v *O'Connor*[2] mentioned below.

In *Campbell* v *Hooper*,[3] where a mortgagee sought a decree directing repayment and foreclosure in default of such repayment and where there was evidence that at the time the mortgage was executed the mortgagor was a lunatic, Stuart VC said at p 605:

> I do not understand that the simple fact of lunacy, if established, would deprive the mortgagee of all rights to equitable relief. I am not aware of any case in which it has been so held ...
>
> Even at law, the contract of a lunatic is not necessarily void. Even at law, the plaintiff in an action at law, seeking to recover under the contract of a person whose lunacy is established, has been held to be entitled to relief ...
>
> Mr Justice Patterson, in the case of *Dane* v *Lady Kirkwall* (8 C & P 685) in directing the jury laid down the law thus: 'It is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it and took advantage of it.' It would be a strange thing if a Court of Equity in dealing with contracts were to deal on any different principle.

In *Imperial Loan Co* v *Stone*,[4] Lord Esher MR at p 601 said that a lunatic (now such a person is known as 'mentally disordered') can only set aside a contract entered into with a person of sound mind in the following circumstances:

> When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what it was about.

The most recent authority on point is *Hart* v *O'Connor*,[2] a decision of the Privy Council (on an appeal from New Zealand) which reaffirmed the principle laid down in *Imperial Loan Co*.[4] The Privy Council reversed the decision of the New Zealand Court of Appeal which held that where a contract is substantively unfair, a lack of capacity can be set up even against a party who was not aware of it. The development of the law on this subject was succinctly stated by Lord Brightman at p 1018 as follows:

> The original rule at law, and still the rule in Scotland, was that a contract with a person of unsound mind was void, because there could be no consensus ad idem. This was later qualified by a rule that a person could not plead his own unsoundness of mind in order to avoid a contract he had made. This in turn gave way to a further rule that such a plea was permissible if it could be shown that the other contracting party knew of the insanity.

Reverting to the facts of the present case, the question that arises for consideration is whether the bank knew or ought to have known that the third plaintiff was mentally disordered and had no contractual capacity. An allegation was made by the second plaintiff in his answers to cross-examination by counsel for the third defendant that two officers of the bank had visited the second plaintiff in his home and they had met the third plaintiff and must have

known that the third plaintiff was mentally unsound. I find this part of the second plaintiff's evidence unsatisfactory and do not accept it. This allegation of actual knowledge on the part of the bank officers was not raised in any of the plaintiffs' solicitors' correspondence with the third defendant's solicitors or in the pleadings until this trial has well commenced and the whereabouts of the two officers could not be ascertained as they have since left the bank. I do not think there is any actual knowledge on the part of any officers of the bank regarding the third plaintiff's mental incapacity; if that were the case, the bank would have committed a fraud on the third plaintiff.

There was also a faint suggestion that anyone who looks at the third plaintiff would have realized that he is of unsound mind. Counsel for the plaintiffs did not really persist with that suggestion. In any case, I am unable to accept it. I do not think it is possible to ascribe to any 'look' as necessarily suggesting unsoundness of mind on the part of that person. I have seen the third plaintiff. There is nothing in his looks as such which would suggest that he is of unsound mind. However, I would be inclined to agree with Dr Ngui that, if one were to talk or put questions to the third plaintiff, one would soon, from his replies, realize that the third plaintiff was not mentally in order.

The point to consider is whether knowledge may be imputed to the bank in view of the circumstances. Here the way in which the bank went about to obtain the mortgage of the said property as security shows that it had made the second plaintiff its agent to secure that. It was through the second plaintiff that the title deeds of the said property were forwarded to the bank. The bank, at no time, dealt directly with either of the two owners of the said property. The bank officials did not see or talk to the owners. The bank communicated with the second plaintiff to obtain particulars relating to the owners of the said property. They were furnished by the second plaintiff. It is significant that even in its letter of 23 July 1974, when forwarding a copy of the draft mortgage deed for approval, the bank did not send it to the owners (which should have been the case) but addressed it to Maha Pte Ltd for the attention of Ismail bin Bilal (second plaintiff), who duly approved the draft mortgage deed. The bank obviously wanted the second plaintiff to forward the same to the owners of the said property and perhaps to explain it to them as well. The first time the owners were contacted with regard to the proposed mortgage was by the letter of 2 November 1974, written by the solicitors for the bank addressed to Abdul Hamid bin Bilal (second defendant), requesting him to call at the solicitors' office together with Alias bin Bilal (third plaintiff) and the directors of the company to execute the mortgage deed. No further explanation was given in that letter. They were not advised to obtain independent legal advice. As mentioned above, when eventually the third plaintiff, together with the others, attended at the office of the solicitors to execute the deed, the solicitor in question, Mr Francis Pillai, did not talk to the signatories at all. He did not explain to any of the persons the nature or the terms of the deed they were about to execute. He just assumed that the parties knew what they were about to execute. He assumed that the second plaintiff had explained to the third plaintiff. In so far as the second plaintiff was concerned, he clearly knew that the third plaintiff was a person non compos mentis. I accept that the third plaintiff was a person non compos mentis. I accept the third defendant's counsel's submission that the second plaintiff did not inform the bank about the third plaintiff's incapacity. Of course, he should have done so. The second plaintiff said that he never explained the draft mortgage deed to the third plaintiff and I accept his evidence on that. Knowing the third plaintiff's mental condition, there would have been no point in the second plaintiff trying to explain it to the third plaintiff. By dealing with the owners of the said property through the second plaintiff rather than directly, the bank has made the second plaintiff its agent and the bank must be imputed to have the knowledge which the second plaintiff had of the mental incapacity of the third plaintiff.

Even assuming that I am wrong to impute knowledge to the bank as aforesaid, constructive knowledge on the part of the bank could still be inferred if one examines the circumstances surrounding the execution of the mortgage deed by the third plaintiff, including the way in which the bank dealt with the owners/mortgagors of the said property. It could be different if the solicitor who witnessed the execution by the third plaintiff had clearly explained to the third plaintiff the full purport of the deed he was about to execute. But that was not the case. As I have said above, the solicitor did not ensure that the third plaintiff understood what he was executing. The solicitor assumed that the third plaintiff understood the document since his brother, the second plaintiff, accepted the draft mortgage deed. This is where the error lies. The second plaintiff could only accept the draft in his capacity as the borrower and not as the owners of the said property. The second plaintiff's interest was clearly different from that of the third plaintiff's. This omission on the part of the solicitor is critical when one considers that the third plaintiff did not sign the deed. He placed his thumb-print onto it. It must be obvious to the solicitor that he was dealing with an illiterate person. That was the first time the solicitor had seen the third plaintiff. He should have at least explained to the third plaintiff the nature and effect of the deed and made sure that he understood it before asking him to place his thumb-print onto it. If only the bank, through its officers, had seen the third plaintiff and spoken to him and/or if its solicitor had explained and spoken to the third plaintiff before the latter was asked to execute the deed, they would have been put on notice as regards the mental incapacity of the third plaintiff. It is of signifi-

cance that even the bank's own internal 'sanction advice' (exh TD 4), from its headquarters in Pakistan approving the banking facilities to the company, recognized the need to deal with an illiterate person with caution as it prescribed the following requirement: 'In case of advances against guarantee or securities provided by a third party who is not conversant with the English language, their signatures should be attested by an independent person (preferably their legal adviser) conversant with the English language endorsing that the contents have been read over and explained to the executors.' The bank officers failed to take steps to ensure that this directive was complied with. It must be remembered that in *Hart* v *O'Connor*,[2] the vendor who was of unsound mind was represented by his own solicitor.

It seems to me quite wrong for a solicitor to make a person, who is illiterate and unrepresented, execute a deed which would clearly be to his disadvantage without so much as to ensure that the person understands what he is about to execute. When asked how he knew that the mortgagors in this case executed voluntarily, as he had so stated in the attestation clause, Mr Francis Pillai answered that he saw them looking at the document and that if there were any doubts they would have asked questions. This really begs the question in so far as the third plaintiff is concerned as he is illiterate. This omission by its solicitor, which in my view is fundamental, must affect the bank. I do not for a moment suggest that this omission was deliberate. It was probably a momentary lapse or a misjudgment. But the consequences must follow. The bank must be deemed to have constructive knowledge of the third plaintiff's mental incapacity. I do not see how a court of equity can permit a party, who has obtained the execution of the deed in such circumstances, to enforce it against the other party. If there is an innocent party here in the true sense, it is the third plaintiff. For the foregoing reasons, I would hold that the deed should be set aside.

Undue influence

On the same facts as discussed above, there is another basis on which the mortgage deed could be set aside. This is on the ground of undue influence, not on the part of the bank but on the part of the second plaintiff as agent of the bank.

Treitel, *Law of Contract* (7th Ed) states the following at pp 314-315:

> Equity gives relief on the ground of undue influence where an agreement has been obtained by certain kinds of improper pressure which were thought not to amount to duress at common law because no element of violence to the person was involved. The burden of proving that such undue influence has been exercised normally lies on the party impeaching the transaction.
>
> The rule as to burden of proof just stated does not apply in a number of situations in which a presumption of undue influence arises from certain relationships between the parties. There was formerly some support for the view that, where such a relationship existed, the transaction could be set aside on grounds of public policy, even though it was not disadvantageous to the party claiming relief. But the House of Lords has now rejected this view and has held that the basis of relief was 'not a vague 'public policy' but specifically the victimization of one party by the other'. It follows that the presumption of undue influence is not, of itself, a ground for relief. It absolves the claimant from having to show that the alleged influence actually existed, but it does not absolve him from the need to establish the unfairness of the transaction that he seeks to set aside.

The House of Lords case referred to in this quotation is *National Westminster Bank* v *Morgan*.[5]

Turnbull & Co v *Duval*[6] and *Chaplin & Co* v *Brammall*[7] are two cases involving the relationship of husband and wife. In *Turnbull*,[6] the creditor used the husband in order to exert pressure on the wife to produce a security for the benefit of the creditor. In *Chaplin*,[7] the creditor left it to the husband to obtain the execution of a guarantee by the wife. In those two cases, equity intervened to grant relief to the two wives on the ground of undue influence exerted by their husbands.

There are a number of recent cases of the English Court of Appeal which are highly instructive as to the way in which the equitable principle of undue influence should be applied. Before doing so, the following caution uttered by Lord Scarman in *National Westminster Bank* v *Morgan*[5] at p 709 merits repeating:

> There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case.

First is the case *Avon Finance Co Ltd* v *Bridger*.[8] There an elderly couple proposed to purchase a retirement house. The arrangements were made by their son. The son agreed to provide his parents with a sum of £2,500 as a loan to purchase the property. Besides the savings which the parents had, they also needed a further loan of £5,000 from a building society which required a first mortgage of the property. The son, however, took the opportunity and raised a loan of £3,500 with Avon Finance Co Ltd by way of a second charge over the property. He deceived the parents into signing the document effecting the second charge by saying that the document was related to the

£5,000 loan from the building society. The document was prepared by the finance company's solicitors and executed at the solicitors' office. The Court of Appeal unanimously held that the charge should be set aside. The reasons of the majority were delivered by Brandon LJ who, after stating that the case fell within the principle of *Chaplin*,[7] said at p 287 that the following three matters gave rise to an equity in favour of the parents:

> The first matter is that the plaintiffs chose to appoint the son, who was the debtor, to procure from his parents the security which he and they needed to further the transaction on which they were engaged. It was for the plaintiffs' benefit to have this security because they are in business for money-lending, and they wanted a good secure money-lending contract. They chose to appoint the son, a young accountant in the prime of life, to procure this contract from his parents, both of whom were old-age pensioners, much less well educated than he was. The person whom they chose to appoint, being a son, could be expected to have some influence over his elderly parents, and that is something of which the plaintiffs could or should have been aware. In fact, the son was fraudulent. He deceived his parents, and by his deception induced them to enter into this transaction. We have those two matters, the procurement of the security by the son and the relationship between the son and his elderly parents of different educational attainment. Finally we have the third factor of the absence of any independent advice.

The next case is *Kingsnorth Trust Ltd* v *Bell*,[9] where a wife executed a second charge on the matrimonial home in which she was beneficially interested as security for the repayment of a sum of money lent to her husband's company. The husband obtained her signature by concealing from her the true purpose of the loan. The lenders' solicitors, having prepared the documentation, forwarded the same to the husband's solicitors with a request that the latter should arrange to have the documents duly executed and returned to them. They also asked the husband's solicitors to act as their agents on completion. The husband then took the documents from his solicitors for signature by his wife. The lenders had no knowledge of how the wife's signature was obtained or of who was going to obtain it. The judges found as a fact that the wife trusted the husband and had been induced to execute the charge by a fraudulent misrepresentation of his part. The judge also found that, if she had been properly advised, she would not have executed the charge. The county court judge nevertheless gave judgment in favour of the lenders. On appeal, the Court of Appeal set aside the order for possession of the judge below, following the principle established in *Turnbull*[6] and *Chaplin*.[7] It held that the lenders were bound by the husband's acts, either because the husband's solicitors, as their sub-agent, had left it to the husband to obtain his wife's signature or because, through their own solicitors, they had chosen to leave it to the husband's solicitors, and thus to the husband, to obtain the wife's signature. Dillon LJ who delivered the judgment of the court said at p 427:

> On the general law of principal and agent, the principal (the creditor), however personally innocent, who instructs an agent (the husband) to achieve a particular end (the signing of the document by the wife) is liable for any fraudulent misrepresentation made by the agent in achieving that end, including any continuing misrepresentation made earlier by the agent and not corrected.

Coldunell Ltd v *Gallon*[10] was a case of an elderly couple who offered to help their son in his business. The son arranged with moneylenders for a loan of £20,000 to the father and the son was to be the surety and the loan was to be secured by a charge on the house where the parents lived. The lenders' solicitors dealt mainly through the son. The solicitors sent to the parents by post a legal charge to be signed by the father and a consent to the loan to be signed by the mother, and sent a letter to each parent advising them to take independent advice before signing the documents. For reasons unknown the letters never reached the parents. The parents' signatures to those documents were procured by the son in the presence of his own solicitor, who merely explained the consent form to the mother and witnessed the signatures without advising the parents as to the nature and effect of the transaction. In this case, the Court of Appeal, not without some hesitation, refused to grant relief to the parents because it held that there was no evidence that the son was in any way an agent of the lenders and the misdeeds of the son could not be imputed to the lenders. Oliver LJ said at p 439:

> Here, by contrast, the father was himself to be the principal debtor and the transaction, so far as the plaintiffs were concerned, was to be completed by their solicitors. Those solicitors, in their turn, caused or thought that they had caused the documents to be dispatched direct to the father and the mother with a covering letter specifically directing attention to the desirability of obtaining independent legal advice. They cannot, it is submitted, and certainly the plaintiffs themselves cannot be held responsible if, after the documents are returned to them executed in the presence of a solicitor, it subsequently transpires that the addressee has chosen to ignore the counsel that he was given.

Later at p 440, he said:

> The proposition, in the circumstances of this case therefore, that Mr Dunsdon, or Mr Dunsdon and Mr Twycross between them, had appointed the son as the plaintiff' agent to obtain his parents' signature or that they had 'left it all to the son' is not, in my judgment, supported by the evidence, and to grant equitable relief to the defendants in respect of the son's acts alone without their authority or knowledge is to go further than any decided case has yet gone. It may well be that, as Dillon LJ said in *Kingsnorth Trust Ltd* v *Bell* [1986] 1 All ER 423 at 428; [1986] 1 WLR 119 at 125, the only absolutely sure way of ensuring that a guarantee or charge from a third party is valid is to insist on that party being independently advised. *But the fact is that no lender can ever be absolutely sure that a guarantor is not being subjected to pressure from the principal debtor, and to require him to do more than properly and fairly point out to the guarantor the desirability of obtaining independent advice, and to require the documents to be executed in the presence of a solicitor, is to put on commercial lenders a burden which would severely handicap the*

carrying out of what is, after all, an extremely common transaction of everyday occurrence for banks and other commercial lenders. (Emphasis added.)

Finally I would refer to the case *Bank of Baroda* v *Shah & Anor.*[11] I will first recite the facts and decision from the headnote of the report:

> By a legal charge in favour of the plaintiff bank the defendants charged their property with the payment to the bank of all moneys at any time owed to the bank by S Ltd. The defendants entered into the legal charge as the result of misrepresentation and undue influence exerted by the second defendant's brother, S, who was one of the two directors of S Ltd, whose solicitors acted for the defendants in connection with the charge although the defendants had not in fact instructed them to do so. Subsequently, S Ltd defaulted under its obligations to the bank and the bank brought an action for possession of the defendants' property. The judge dismissed the action, holding that the defendants had executed the charge under the undue influence of S and S Ltd's solicitors, that the defendants would not have executed the charge but for such influence, and that the bank was infected with the conduct of S and the solicitors. The bank appealed.
>
> Held: There was no obligation in law on the bank to ensure that the defendants received entirely independent legal advice before they executed the legal charge on the property. The bank was entitled to assume that S Ltd's solicitors would act honestly and would give proper advice to the defendants if the solicitors were, as they represented, acting for the defendants, and when the legal charge executed by the defendants was returned to it by the solicitors the bank was entitled to treat the return of it as confirmation that the solicitors had indeed been acting as solicitors for the defendants. The fact that, unknown to the bank, S Ltd's solicitors had no authority from the defendants to act did not lead to the conclusion that the bank was to be treated as having entrusted the task of getting the legal charge executed by the defendants to the solicitors in the capacity which they actually held, namely, as agents for S and solicitors for S Ltd. In the circumstances, the bank was not infected with the conduct of S in exerting undue influence on the defendants or of S Ltd's solicitors in misrepresenting to the bank that they had authority to act for the defendants.

Now it should be observed that *Bank of Baroda*[11] involved a brother and a sister. It is clear that the Court of Appeal decided the way it did because it held that neither the bank nor its solicitors left it to S or S Ltd to obtain the execution of the deed by the defendants. Its solicitors dealt directly with another firm of solicitors who held themselves out as acting for the defendants. Dillon LJ said in conclusion at p 29:

> Against that background it is plain, in my judgment, that Singh & Ruparell never intended for a moment to leave it to Jayantilal Shah or Seasonworth to get the legal charge executed by the defendants. They left that to Shah & Burke in the capacity of solicitors for the defendants which Shah & Burke had represented themselves as holding and which Singh & Ruparell believed them to hold. The fact that, unknown to Singh & Ruparell, Shah & Burke had no authority from the defendants does not lead to the conclusion that Singh & Ruparell are to be treated as having entrusted the task of getting the legal charge executed by the defendants to Shah & Burke in the capacity which they actually did hold, namely, as agents for Jayantilal Shah and solicitors for Seasonworth.
>
> Accordingly in my judgment the defendants fail to bring this case within the *Turnbull* v *Duval* [1902] AC 429 and *Chaplin* v *Brammall* [1908] 1 KB 233 line of authorities.

On the above authorities, it is clear that whether in a particular case the lender has made the debtor its agent to obtain a security from a surety and, whether the debtor has exercised undue influence over the surety of a kind which would entitle the surety to set aside the security, would very much depend on its facts. In the present case, while the relationship of the second plaintiff and the third plaintiff as brothers does not per se give rise to a presumption of undue influence, but on the evidence there can be no doubt that the second plaintiff did in fact exercise undue influence over the third plaintiff in securing the execution by the third plaintiff of the mortgage deed. Not that it matters, I think that the bank must have realized that some influence would have been brought to bear by the second plaintiff over the third plaintiff, as the business of the company had nothing to do with the third plaintiff. Why should the third plaintiff put his property to risk? As the third plaintiff said in court, he would do what his brother, the second plaintiff, asked him to do. I am convinced that that was so and that was what happened. The second plaintiff did not explain to the third plaintiff what the document was about. The second plaintiff knew that the third plaintiff would carry out his biddings, whatever they were. As I have held above, the bank made the second plaintiff its agent in obtaining the mortgage of the said property from the third plaintiff. It will be recalled that the bank did not send the draft mortgage deed for approval to the owners but to the second plaintiff. This necessarily suggests that the bank had intended to make the second plaintiff its agent to forward the draft to the owners and perhaps to explain the draft to them. I know I am repeating myself but it has to be said again: none of the bank officers bothered to talk to or confirm with the owners that they had, on their own free will, parted with possession of the title deeds of the said property to the second plaintiff for him to forward the same to the bank and that they had understood what they were going to do. It is true that the bank's solicitors wrote to one of the mortgagors (the second defendant) asking him and the third plaintiff, as well as the directors of the company, to come to the solicitors' office to execute the mortgage deed and the deed was so executed at the solicitors' office. I would mention in passing that in *Avon Finance Co Ltd*[8] (though the facts there are not identical to ours), the instrument was executed in the lenders' solicitors' office and that did not seem to make a difference. This intervention by the bank's solicitors was really of no consequence as the solicitor in charge did nothing to remove whatever influence the second plaintiff had exercised over the third plaintiff. He assumed that the second plaintiff had ex-

plained to the third plaintiff. He relied on the fact that the second plaintiff had accepted the draft mortgage deed. In other words, whatever undue influence exercised by the second plaintiff over the third plaintiff was allowed to remain. For all practical purposes, it is in my view the same as if the solicitor had allowed the second plaintiff to take the document home for the third plaintiff to execute. The mortgage deed was after all a common law deed which did not require any attestation. I find that the influence which the second plaintiff had over the third plaintiff must have persisted throughout the execution. All I can say is that the solicitor was physically there but nothing more. Such presence per se cannot be of any significance. The third plaintiff had nothing to gain and everything to lose out of the transaction. It was a transaction which was entirely to his disadvantage. He was unrepresented, yet neither the bank nor its solicitors saw fit to advise the third plaintiff to take independent advice in view of the adverse consequences that could arise from the mortgage deed. The bank must be held to be affected by the undue influence exercised by the second plaintiff over the third plaintiff. Accordingly the mortgage deed should also be set aside on this ground.

The argument has been advanced by counsel for the bank that, as the mortgage deed is only voidable, it should not be set aside as there could not be restitutio in integrum: see *Niell* v *Morley*[12] and *Molton* v *Camroux*.[13] But I will just quote the following statement from Treitel, *Law of Contract* (7th Ed) at p 321:

> As in cases of misrepresentation, the party seeking rescission must restore benefits that he has obtained under the contract, but he is not required to make *precise* restitution: the principle of allowing rescission for misrepresentation so long as equity can achieve a result that is 'practically just' applies also where rescission is sought on the ground of undue influence.

The third plaintiff received nothing under the mortgage deed from the bank. There is nothing for him to make restitution.

Before I conclude this judgment there are three matters which were raised in evidence and in submission and which I think I should refer to briefly. The first relates to the purchase of the said property in 1961. The said property was purchased by the second defendant and third plaintiff on 11 October 1961 with their shares of the proceeds from the estate of their deceased father. The third plaintiff then executed the indenture of conveyance also by his thumb-print. Mr Francis Pillai said he had come across clients who had executed deeds by way of thumb-print but who were none the worse in terms of mental capacity. I accept that illiteracy does not necessarily mean unsoundness of mind. Be that as it may, the question of the validity of the indenture of conveyance of 11 October 1961 is not before me. But it should be apparent that a simple purchase of property is, of course, a different kind of transaction from a mortgage of property to a bank to secure banking facilities granted by the bank to another customer. Even there, Mr CC Tan, who acted for the parties in the conveyance, in answer to the question whether he explained to the third plaintiff the transaction, said: 'I only asked a few formal questions; did you buy this property with your brother. I must have spoken to him in Malay.' When asked whether he would take the trouble to explain the details of a mortgage, like the present, to a mortgagor, he answered he would. Mr Tan also said that he would send the draft mortgage to the mortgagors and not the borrowers. I do not think there is anything relating to the earlier transaction in 1961 which could mitigate the effects of the omissions of the bank and/or its solicitors.

The second matter relates to the change of the mortgage from one of equitable mortgage to one of a legal mortgage. Connected to this is the point that the solicitors also altered the terms thereof, ie as security for $60,000 to one of an unlimited amount and a security for a five-year term to one without any specified period. I must state here that, in forwarding the title deeds to the bank on 16 January 1974, no mention was made by the second plaintiff about the amount to be secured or the period thereof. These two terms were only raised in the correspondence between the bank and its solicitors which were never copied to the company or the owners. The second plaintiff in his evidence before me did not say that he did discuss with the bank officers on these two terms. In view of my finding that nobody ever explained to the third plaintiff what the transaction was all about, much less the details thereof, I do not think these points are of any consequence. For this same reason, I do not think the plea of non est facum is applicable.

The third matter relates to the allegation that the bank put undue pressure on the second plaintiff to obtain the mortgage. Having considered the evidence, including the correspondence and other documentary evidence surrounding the transaction, I do not see anything wrong in the bank asking for the mortgage as an additional security for the banking facilities. The fact that the bank had probably relied more on the standing and commitment of Peter Wahid Andu in granting the facilities to the company did not necessarily mean that they could not also legitimately ask for more tangible security from the directors of the company. The allegations of pressure on the part of the bank officers are rather vague. The second plaintiff said this arose because of the nationalization of the bank in 1974. But the bank had already indicated its requirement of an equitable mortgage as early as January 1974 and there is no evidence that by then the bank had already allowed the company to draw on the facilities. I find the second plaintiff to be a worldly-wise businessman. He must have thought that this link-up with Peter Wahid Andu was going to be profitable. It might well be that he underrated the risks. But the court cannot help him

there. For the record, I may mention that Peter Wahid Andu died in an air crash in June 1976 and a judgment in default had been obtained by the bank against his estate in the High Court in Borneo pursuant to the guarantee given by him on 7 March 1974. Only part of the judgment had been satisfied from his estate. Having said the foregoing, I must hasten to clarify that this matter in no way affects the points discussed above relating to the mental incapacity of the third plaintiff and the exercise of undue influence by the second plaintiff over the third plaintiff.

In the result, I would grant a declaration that the mortgage deed executed by the third plaintiff is voidable at the option of his committee and would set it aside (in so far as it affects the third plaintiff) and grant such other consequential reliefs as may be necessary. The third defendant shall bear the costs of the plaintiffs.

Order accordingly.

Solicitors: *V Ramakrishnan & Co; Ng Kian Fong & Co; Mallal & Namazie.*

Reported by *Terence Tan Bian Chye*

MALAYSIAN REPORTS

Siew Kam Weng v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) - CRIMINAL APPEAL NO 14 OF 1988
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED AZMI AND AJAIB SINGH SCJJ
16 SEPTEMBER 1989

Criminal Procedure - Trial by jury - Charge of murder - Jury finding accused guilty of lesser offence of culpable homicide not amounting to murder by a majority of five to two - Trial judge unable to concur with majority verdict - Retrial ordered - Appeal - Jury rightly discharged - Criminal Procedure Code (FMS Cap 6), ss 204, 224, 225, 228, 229, 230 & 231

In this case, the appellant had been tried on a charge of murder of an 11-year old girl, an offence under s 302 of the Penal Code (FMS Cap 45). The appellant was tried before a jury of seven persons who found him guilty of the lesser offence of culpable homicide not amounting to murder by a majority of five to two. The trial judge was unable to concur with the majority verdict and ordered the appellant to be retried before another jury. The appellant appealed. In his summing up, the trial judge had indicated that substantially the prosecution had conducted its case on the basis of murder or nothing. He did direct the jury on the four possible verdicts that they could return, including a verdict of guilty of culpable homicide not amounting to murder. The main ground of appeal was that having directed the jury on the four possible verdicts, the learned trial judge had no alternative but to accept and concur with the majority verdict.

Held, dismissing the accused's appeal:

(1) The English principle that an appellate court has no jurisdiction to review the trial judge's exercise of discretion to order the accused to be tried before another jury is founded on even stronger ground in this country when such order is made as a result of the exercise of option by the trial judge not to concur with the majority verdict under s 231(b) of the Criminal Procedure Code (FMS Cap 6).

(2) In the light of the statutory provision clearly expressed in s 231(b) of the Criminal Procedure Code (FMS Cap 6), when the trial judge in a jury trial did not concur with a majority verdict of guilty for whatever offence returned by the jury, the judge had no alternative but to discharge the jury and order the accused to be tried before another jury.

(3) The duty of the trial judge under s 223 of the Criminal Procedure Code (FMS Cap 6), in summing up the evidence and laying down the law by which the jury are to be guided, has nothing to do with his duty and option under s 231 of the Code if the guilty verdict of the jury is not unanimous.

Cases referred to

1 *Windsor* v *The Queen* (1866) 1 LRQB 289 (follld)
2 *R* v *Newton* 174 ER 896 (follld)
3 *R* v *Lewis* (1909) 2 Cr App R 180 (follld)
4 *R* v *Home Office, ex p Graham* [1983] 1 WLR 1281 (follld)
5 *R* v *Beadell* (1933) 24 Cr App R 39 (follld)
6 *R* v *Randall* (1960) Cr LR 435 (follld)
7 *R* v *Gorman* [1987] 1 WLR 545 (follld)
8 *Ramlan bin Salleh* v *PP* [1987] 2 MLJ 709 (follld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 204, 224, 225, 228, 229, 230, 231